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Legislative Survey
Europe - No. 1

25 August 1944

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SUMMARY

1. The statutes and administrative practices in Sweden and Switzerland on the control of the arms trade form part of a consistent national policy. Both have imposed restrictions which exceed the minimum requirements of traditional international law.

2. The controls enacted by these two countries during World War I were imposed not only for the purpose of satisfying neutral duties but also for that of maintaining home supplies.

3. There is evidence that during World War I neutral states deviated from the standards of their embargo legislation either for reasons of executive exemptions in aid of national needs or through belligerent pressure.

4. Both these countries imposed administrative controls on the export of arms during the Chaco War, the Ethiopian War and the Spanish Civil War.

5. Control of the arms trade has not been affected by multilateral or bilateral treaties.

6. In the present war, both Sweden and Switzerland control traffic in arms by a mandatory license system, which seems like that which existed in 1914-1918.

7. There has been no departure from the rule of customary international law, that a neutral state has no obligation to restrict private trade in arms.

8. While there is no binding precedent in the field, there is a tendency in legal thinking to find a breach of neutral duties if a state-owned or controlled corporation in a neutral country supplies arms to a belligerent.

9. If a state enacts legislation in control of the arms trade, which exceeds the minimum requirements of international law, that state incurs international responsibility for breach thereof only if it has failed to use due diligence in the enforcement of its domestic laws.

10. Only states which have been directly injured by such breach of so-called neutrality statutes may protest the breach or make claims based thereon.

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LEGISLATIVE STUDY - EUROPE NO. I

PART I. HISTORICAL NOTE.

The statutes and administrative practice on the control of the arms trade, which have developed in Sweden and Switzerland, constitute only a small part of the record of a national policy. Both countries have a consistent record of imposing restrictions upon their nationals, which exceed the minimum requirements set by international law for the satisfaction of neutral duties.[1] Sweden, for example, has a permanent license system for the export traffic in arms under the decree of 19 December 1930[2] and, further, was a party to the neutrality regulations framed 27 May 1938[3] to secure uniformity of practice in the Scandinavian countries. Switzerland

1. See, for example, the Swedish Royal Ordinance of 30 April 1904, on Swedish commerce and navigation in time of war between foreign nations, which, among other things, banned the carriage of contraband in Swedish ships, Deak and Jessup, Neutrality laws, regulations and treaties (Carnegie Endowment for International Peace, 1936), 2961; and also the circular of 20 September 1870 from the Swiss Federal Department of Justice and Police to the chief police authorities of the cantons, id. 1057. The latter specifically directed careful observation of factories engaged in the manufacture of arms and of persons engaged in this type of commerce.

2. So reported to the League of Nations, see 15 Official Journal (League of Nations) 1598-1599.

3. Text in 32 American Journal of International Law, Supp. 141.

has her well-known policy of permanent neutrality, which is reflected in the broad basic provisions in its Federal Penal Code of 4 February 1853,[4] prohibiting and punishing the commission of acts contrary to the law of nations.

World War I. Both countries have consequently sought to control trade in much wider aspects than those envisaged by the Hague Conventions. This policy of controlling participation by neutral nationals in contraband trade received one of its major tests during World War I. Both Sweden[5] and Switzerland[6] promptly imposed embargoes on the export of arms. It is impossible to ascertain whether these embargoes were imposed in a desire to observe neutral obligations over and above those set by customary international law, or whether their imposition was the result of a desire to conserve home stocks. In the case of these two countries, the Secretary of State was able to report to the President only as to Sweden, and that, to the effect that the embargo was designed to conserve arms for home use and to avoid retaliatory action by the British.[7]

4. Art. 39, 41, and 42, quoted in Deak and Jessup, op. cit. n. 1, [illegible]-991. Attention is directed to the fact that Articles 39 and 41 refer both to the violation of Swiss and foreign territory and to the commission of acts contrary to the law of nations.

5. Naval War College, 1915 International law notes 45,53.

6. Id. 53; Naval War College, 1916 International law notes 71, 72.

7. See 1915 For. Rel., Supp. 804; see also Charge in Sweden to Secretary of State, 2 Sept. 1915, id. 802-803.

The issue as to the duty of neutral states under international law to control private trade in arms was promptly and definitively settled in favor of the freedom of the private individual to engage in that trade, subject to the risks inherent in the rules of prize law.[8] European neutrals, such as Sweden and Switzerland, were concerned at that time not so much with the control of the arms trade as with control of trade in conditional contraband. For this period, therefore, the effect of government control of export trade was discussed as to commodities other than war supplies. It has, however, certain significance for the present problem.

While there is diplomatic correspondence involving the performance of neutral duties by these two countries, the chief example of dispute as to a neutral state's duty to control its export trade is contained in the correspondence maintained by the Netherlands with the various belligerents.

State control was early urged by the belligerents as the means of assuring innocent destination and civilian consignee.[9]

8. The chief correspondence took place between the United States and the Central Powers. See the American note of 21 April 1915 to Germany, 1915 For. Rel., Supp. 160-162 and the American note of 12 August 1915 to Austria, id. 794-799.

9. In a note of 9 Nov. 1914, the British ambassador informed the Counselor of the Department of State of Norwegian, Swedish and Danish government guarantees against re-export. A Foreign Office direction of the day before to the British representatives in those countries stated that the fleet had been directed to pass cargoes destined for named consignees in those countries, because of this guarantee and because of British reliance upon these governments "to see that such goods are landed in Norwegian, Swedish, and Danish ports of destination and not subsequently exported or passed on in transit to enemy countries." 1914 For. Rel., Supp. 341.

The Dutch Government protested to the German Legation "most formally against the assumption that it has decreed any export prohibitions under pressure from the British Government. In decreeing such prohibitions, it has been actuated solely by the anxiety to keep up necessary stores in the country. Furthermore, it has taken part in no exchange of views on the subject with the British Government."[10] However, government guarantees against re-export did not satisfy belligerent requirements,[11] and by September, 1917, belligerent pressure had made it expedient for the Netherlands to go beyond conventional prohibitions and license controls and to regulate its exports through a government agency, the Netherlands Export Company (Nederlandsche Uitvoer Maatschappij).

Difficulties arose both as to Dutch exports and as to transit traffic. In the case of sand and gravel, the Dutch sought to require examination on the spot by a Dutch commission to establish

10. Quoted 1915 For. Rel., Supp. 136.

11. In a memorandum of 29 December 1914, the British Foreign Office informed the American Embassy that it had difficulties with the Swiss who granted "unlimited dispensations from their prohibitions of export" and that the Dutch guarantee was meaningless so long as the Dutch observed the Rhine treaties. The Swiss position on these exemptions is significant. In a note of 8 January 1915, the Swiss Minister informed the Secretary of State that "the economic interests of Switzerland, however, require that the Federal Council reserve a free hand in granting exceptions from the above-mentioned embargo. Under all circumstances, the Government should have the right to permit certain exceptions on industrial products in the case of articles for further use in manufacture and, exceptionally, for the purpose of giving compensation for obtaining from abroad such indispensable supplies as coal, soda, and particularly worked pieces of iron. The total of these exemptions does, the Federal Council states, not play any part whatever on belligerents." Id. 305.

12. Vandenbosch, The neutrality of the Netherlands during the World War (Grand Rapids, 1927), 20-21.

See next page

non-military use and thus satisfy the rules on conditional contraband. Yielding to pressure, they finally permitted export on a percentage basis.[12] In the case of coal, minerals and metal in transit from occupied Belgium, the Dutch required a certificate from the Dutch consul in Belgium that the goods were not war booty, requisitioned property or military supplies.[13] This was unsatisfactory to the British and the Dutch were forced to yield here also. Both cases are usually referred to in legal literature as issues settled by retorsion.

It is notable that, when the Netherlands pointed out that a Russian committee in London sent supplies over the so-called Skiboth sleigh route in northern Norway to Russia, Great Britain conceded that the legality of the shipment could be challenged under the 1907 Hague rules but asserted that Norway alone had the right to do so.[14]

13. Id. 22-23.

14. Id. 36.

In this connection, attention is directed to the conversation reported 30 Oct. 1915 by the American Minister in Sweden to the Secretary of State. He stated that Admiral Lindman, chief of the Swedish trade commission, had informed him that Sweden was willing to give Britain "any reasonable concessions" not "inconsistent with the sovereign rights of the Swedish nation" and that they believed that Britain wished to "induce Sweden to allow passage in transit of any amount of goods to Russia and at the same time to restrict Sweden to a minimum amount for her own use, and of course not to allow the passage of any goods from Sweden to Germany." The Admiral referred to the Swedish embargoes and to the unwillingness of the English to give Sweden "any freedom in the matter of its commerce." 1915 For. Rel. Supp. 835.

So far as it is known, there has been no diplomatic settlement of a claim based upon a neutral nation's failure to control its export trade, or arbitration of such an issue, for the period of World War I. The claims which were successfully pressed were rather for belligerent offenses, primarily interference with neutral trade.

Postwar Action. In the period following World War I, there were several episodes which tested national control of the export of war materials.

There is no evidence that either Sweden or Switzerland took an active part in the arms embargoes applied to China after 1919.

The Chaco War, however, brought action in both countries when, by resolution of 19 May 1934, the Council of the League of Nations sought to restrain the export and transit of war materials,[15] the Committee of Three approached the various countries as to the possibilities of an arms embargo. Under a statement of 14 July 1934, Sweden reported that she had applied license statutes and had been refusing licenses for Bolivia and Paraguay since May 1934. Sweden also reported that the 1925 multilateral pact had been used as the basis test for licenses and that it "only authorises the export of arms and war materials for war purposes when they are intended for governments."[16] Switzerland stated that the desired ban

15. 15 Official Journal (League of Nations) 786.

16. Id. 1598-1599.

already existed.[17] It is notable that Switzerland refused to interfere with existing legitimate contract rights and that there was consequently performance on one such contract.[18]

This result was repeated in the case of the Ethiopian War.[19]

In the action taken to implement the Non-Intervention Agreement as to the Spanish Civil War, Sweden reported that the necessary legislation already existed, that by executive order no licenses for the areas in question had been issued since 11 April 1936, and that the prohibition included contracts in the course of execution.[20] Switzerland had refused to join in the declaration because of her policy of permanent neutrality,[21] but reported that she had already taken parallel action.[22] The legislation in question

17. Id. 843.

18. Id. 843, 1599.

19. See, for example, the decree of 28 October 1935 by the Federal Council Deak and Jessup, op. cit. n. 1, 1033-1034.

20. The legislative and other measures taken by the participating governments to give effect to the agreement regarding non-intervention in Spain, and by Switzerland (Spain no. 2 /Cmd. 5300/, 1936) 15.

21. Id. 7.

22. Id. 15.

covered export, re-export and transit.

The postwar period also brought a considerable popular demand for the control of the traffic in arms. However, the Convention of St. Germain of 10 September 1919 never entered into force; nor did that of 17 June 1925, which was drafted under League auspices.

The failure to secure regulation by means of a multilateral pact is reflected in provisions of bilateral treaties. Attention is directed to the provisions which were often written into commercial treaties negotiated by Sweden and Switzerland in the twenties. Articles which stipulated for no restraints on reciprocal trade often carried a provision permitting restraints as to arms, ammunition and war materials and, in exceptional cases, other war materials.[25]

PART II. PRESENT SITUATION

In the present war, Sweden has continued her statutory and administrative practices. In fact Swedish export trade is entirely

25. See, for example, the treaty of 7 July 1923 between Sweden and Estonia, 20 Treaty Series (League of Nations) 191; that of 6 Jan. 1926 between Switzerland and Austria, 46 Treaty Series (League of Nations) 300, 301 and 343; that of 14 July 1926 between Switzerland and Germany, 59 Treaty Series (League of Nations) 87, 89; that of 7 July 1923 between Switzerland and Italy, 25 Treaty Series (League of Nations) 23, 25.

subject to license.[24] Switzerland has likewise continued her traditional policy of strict control of the arms trade[25] and has expanded the control to include her entire economy. The British representative at Berne early reported that only some twenty items of no importance were exempted from the requirement of an export license.[26]

24. See, for example, the Royal Decree no. 639 of 8 Sept. 1939, which requires a license for the export of a long list of commodities, including foodstuffs, iron, steel and certain machines, (1939) 144 Bd. of Trade Journal 667-670, and that of 27 Oct. 1939 requiring license for the export of malleable iron, steel and construction iron work, id. 450-451.

25. Decree of 8 July 1938, 54 Rec. Off. (Switzerland) 518 ff. (1938) Art. 1 subjected to government control the manufacture, acquisition, commerce and distribution, import and export of arms, ammunitions, explosives, other war materials and their parts, Art. 3 made even more explicit the scope of government control for it subjected to the same control any manufacture or acquisition of war material, and in fact trade connected with the distribution, import or export thereof. It made a single exception in favor of manufacture under government management. Art. 6 required a license issued by the military authorities for (a) proposed manufacture of war materials, (b) acquisition thereof for sale, trade or distribution, and (c) agency for such transactions. Art. 16 penalizes wilful breach by a maximum fine of 4,000 francs and a maximum jail sentence of one year, and authorizes doubling of the penalties in case of aggravated cases. Art. 17 penalizes those who wilfully fail to register orders for such goods, export or import thereof without license, or violate conditions imposed in the license, or refuse access to appropriate records by administrative officers, or fail to keep proper records. The penalty is 10,000 francs and six months in jail. Art. 19 applies the provisions of the Federal Penal Code, and rules that, when no more than negligence is established, the penalty is half the maximum penalty set for other cases. It further authorizes the judge to direct confiscation of the goods in question for the benefit of the Confederation.

The amendments which have been traced do not change anything of substance but relate merely to detail.

26. 145 Bd. of Trade Journal, 413 (1939)

It has proved impossible to find reliable reports of litigation under these statutes.

Attention is directed to the fact that under this license system there is no apparent barrier to a continuation of the executive dispensation to which the British Government took exception to in 1914 (supra n. 10).

Legal Significance of this Situation. International law has heretofore been content to impose the duty to abstain from the arms traffic only upon the neutral state itself and to impose no duty upon it to prevent its subjects from engaging in the arms trade.[27] The controls which are now in operation in Sweden and in Switzerland exceed this minimum. The issue therefore becomes how far those states would incur international responsibility if they fail to enforce these statutes.

There is no diplomatic controversy which would serve as an efficient guide and precedent in such matters. There is, however, certain evidence of the direction of legal development. The British Admiralty is on record at least once that it would be a breach of neutral duties for armament firms in a neutral country, which were under government control, to supply belligerents.[28] Question has

27. See, for example, Lauterpacht's Oppenheim (5th ed.), 2, 523, 599-603.

28. See the memorandum opposing government control as proposed during the drafting of the Covenant of the League of Nations. Quoted in Miller, Drafting of the Covenant (1928), I, 288.

also been raised as to the similar issue of whether it would be a breach of neutral duties if loans or credits were supplied by a state-controlled corporation in a neutral state. There is at least one research unit which is of the opinion that there would be a breach of neutral duty in such cases.[29]

In addition to this evidence, the rule of "due diligence" laid down in the arbitration under the Treaty of Washington between the United States and Great Britain[30] indicates that, while not a guarantor of enforcement, a state must show reasonable effort to enforce its duties under international and domestic law. It may well be argued, that having enacted such laws, Sweden and Switzerland must now prove due diligence in administration of the new system. This argument might be supported by analogies in other fields of international practice.

On the other hand, the issue remains as to the state which is entitled to challenge the sufficiency of such legislation and its enforcement. This is implicitly the issue which Great Britain raised in her correspondence with the Netherlands during World War I. It would seem that Great Britain was implying that a state not directly injured by a violation of neutrality could not protest it, and that

29. Harvard Research in International Law, Neutrality, (1939) 33 American Journal of International Law, Supp. 345-349.

30. Pasicrisie 195; Moore's History of Arbitration, 550.

the only state injured would be the belligerent to whose disadvantage it worked, as was the case in the arbitration under the Treaty of Washington. This would be in line with the reasoning of the Permanent Court of International Justice in the Kiel Canal Case,[31] in which it sought to find an interest in all the parties plaintiff.

31. Series A, no. 1.